TABLE OF CONTENTS

PAGE

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Petition for a Declaratory Ruling that Early Termination Fees Are "Rates Charged for Wireless Service"	)))))))	Docket No. 05-194
In the Matter of Clarification That Early Termination Fees Charged to Cellular Telephone Customers Are "Rates Charged" Within the Meaning of 47 U.S.C. §332(c)(3)(A)	))))))	Docket No. 05-193

REPLY COMMENTS OF WIRELESS CONSUMERS ALLIANCE, PORSHA MEOLI, LESLIE ARMSTRONG, SRIDHAR KRISHNAN, ASTRID MENDOZA, CHRISTINA NGUYEN, DELORES JOHNSON, BRUCE GATTON, KATHERINE ZILL, MARK LYONS, RICHARD SAMKO AND AMANDA SELBY

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I. EXECUTIVE SUMMARY

In 1994, after passage of OBRA, the Commission determined that the wireless industry should be driven by competition in a free market rather than by regulatory strategies. The Commission ordered wireless carriers to enter into contracts with their subscribers, thereby adopting, as a matter of necessity, the application of the contract laws of the various states to govern the enforcement of wireless carrier contracts.

In response to the Commission's order, the wireless carriers developed service agreements that became contracts of adhesion in that they required their subscribers to enter into these agreements without the possibility of any negotiation of terms. All of the wireless carriers have included in these standard form service agreements a provision indicating that the enforcement of the service agreements would be governed by state contract laws.

The Commission has stated that there is a strong public interest in preserving the sanctity of contracts. Along that line, the Commission thought that the public interest would be best served by establishing market conditions that more closely resembled an unregulated environment, and that wireless carriers should not be subject to a market-distorting regulatory regime.

Although the wireless carriers and the CTIA now assert that all ETFs are either "rates charged" or part of the "rate structure" for wireless service, almost all of the major wireless carriers have admitted that their ETFs are liquidated damage clauses. By definition, a valid liquidated damages clause must set forth a reasonable estimate, agreed to by both contracting parties, of the actual damages that would be suffered by the aggrieved party if the contract were breached. If the ETF is a reasonable estimate of actual damages upon breach of the contract, the ETF cannot possibly be a "rate charged" for service.

The class action lawsuits filed in California, Illinois and Florida seek a court determination of whether the ETFs they are challenging are lawful liquidated damages clauses or are in fact unlawful penalties.

To be valid under state contract law, a liquidated damages provision must satisfy two requirements: First, the actual damages must be impracticable or extremely difficult to fix. Second, as noted above, the liquidated damages amount must be an amount which the parties have agreed is a reasonable estimate of the anticipated actual damages that would be suffered by the aggrieved party if the contract were breached. The plaintiffs in the ETF class action lawsuits contend that the ETFs they are challenging fail both of these tests and, thus, are unlawful contractual penalties. Specifically, the class action plaintiffs assert that the actual damages of the carrier defendants in the class actions are easily ascertainable rather than being impracticable or extremely difficult to fix, and that, in any event, the amounts of the ETFs in question are not a reasonable estimate of the anticipated damages, if any, that a carrier would suffer if a subscriber breached the contract.

There is strong evidence that the ETFs imposed by many wireless carriers are penalty clauses, not valid liquidated damages. For example, an Illinois state court has found that Sprint did not attempt to estimate the amount of actual damages it would incur if a subscriber was to cancel early, and that Sprint was capable of calculating with specificity the actual damages sustained in the event of early termination. In addition, the ETF clause in a Cingular service agreement provides that in twelve states out of fifty, the ETF amount is prorated at the rate of $20 per month multiplied by the number of months or parts of months remaining on this service contract at the time of its early termination. *See* Exhibit M to the Comments of Wireless Consumers Alliance et al., filed herein on August 5, 2005 ("WCA's Initial Comments").

The wireless carriers and CTIA contend that all ETFs are "rates charged" because they are essential to recover up-front costs such as customer acquisition costs and discounted handset costs that are spread over the term of the contract. The wireless carriers claim that the ETF is an amount of money that the subscriber agrees to pay a wireless provider for the up-front customer acquisition costs and handset costs. This position is contrary to the wireless carriers' admissions that their ETFs are liquidated damages. Moreover, it is inconsistent with the manner in which the major carriers actually impose ETFs. Thus, the major wireless carriers charge an ETF for each telephone that a subscriber has in service. Thus, if a subscriber who terminates early has ten wireless telephones, he would pay ten separate ETFs or $2,000, if the ETF was $200. It is readily apparent that the customer acquisition cost for a single subscriber would be approximately the same as for any other single subscriber. Obviously, in the foregoing example, the ETF amount goes far beyond any amount designed to recoup customer acquisition costs. Furthermore, there is no provision in any wireless service agreement of which WCA is aware that states that the subscriber is to specifically pay for up-front customer acquisition costs and/or discounts on handsets. The subscriber primarily agrees to pay a monthly service/access fee and to pay for air time. Presumably, as within any business, all of the wireless carrier's costs are factored into the amount set by the wireless carriers for the monthly service/access charge and the amount set for air time payments. Under state contract law, an injured party's damages cannot exceed what it would have received if the contract had been fully performed on both sides. Therefore, wireless carriers cannot recover the amount of "customer acquisition costs" and handset discounts in a breach of contract action.

Most of the arguments set forth by the wireless carriers and CTIA are based on the wireless carriers suffering substantial loss of revenue if the ETFs are determined to be unenforceable. However, the wireless carriers' own actions and arguments belie this view. Thus, in California, Verizon has filed cross-complaints against individual subscribers that have filed ETF suits against it, contending that if the subscribers' ETFs are found to be unlawful penalties, Verizon is entitled to recover "actual damages" attributable to the early termination of the subscriber's contract. Indeed, CTIA and the other major wireless carriers endorse this view – they assert that if the ETF is unenforceable, they can still collect "actual damages." In light of this position, the industry simply has not demonstrated that they would lose revenue if their ETFs were eliminated or modified by a court so as to comply with state liquidated damages laws.

Finally, the wireless carriers and CTIA claim that a state-by-state invalidation of ETFs would threaten to substantially impair the uniform, national and deregulatory framework established by the Commission for wireless carriers, and would result in a patchwork of oversight which would require the carriers to adjust their rate structure from jurisdiction to jurisdiction. However, this argument as well is without merit. First, as WCA demonstrated in its Initial Comments, the two savings clauses applicable to this issue – the one embedded in 47 U.S.C. § 332(c)(3)(A) and the general savings clause of 47 U.S.C. § 414 – establish that it was Congress's intention that state laws of general applicability that do not constitute rate-setting apply. The state liquidated damages statutes clearly satisfy this standard. Thus, to the extent that "nationwide uniformity" is deemed a goal, it does not trump the express intent of Congress to allow states to enforce relating to consumer protection and contracts. Furthermore, the carriers and CTIA have not shown that giving effect to state liquidated damages laws would in any way impair "nationwide uniformity." They have presented no facts showing that there are any material differences between or among the laws of the 50 states that relate to liquidated damages and penalties. The fact is that the state contract laws of all fifty states are substantially similar with respect to liquidated damages and penalties. Therefore, the contention of an adverse effect upon a uniform, national and deregulatory framework is wholly without merit.

II. ARGUMENT

A. IN 1994, THE COMMISSION IMPLEMENTED THE PRO-COMPETITIVE DEREGULATORY FRAMEWORK FOR CMRS PRESCRIBED BY CONGRESS WHEREIN CONGRESS DIRECTED THAT THE RELATIONSHIP BETWEEN CMRS PROVIDERS AND THEIR CUSTOMERS BE GOVERNED BY SERVICE CONTRACTS IN A COMPETITIVE MARKETPLACE

A principal purpose of the Communications Act at the time of its enactment in 1934was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. The centerpiece of the Act was the requirement set forth in Section 203 that the communications common carriers file their rates with the Commission and charge customers only those rates. *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003). Under the tariff system, the Commission reviewed and approved rates and determined what level of profits the regulated carrier would earn. *Orloff, supra*, at 419-420. Under the tariff system, the rights and liabilities defined by the tariff could not be varied or enlarged by either contract or tort of the carrier, and therefore, any state law claim seeking to enforce a contractual provision that differed from the filed rate was preempted by federal law. *Icom Holding, Inc. v. MCI Worldcom, Inc.*, 238 F.3d 219, 221 (2d Cir. 2001).

However, in 1993, with the passage of OBRA, Congress gave the Commission authority to eliminate the tariff system with respect to CMRS, and in 1994, the Commission exercised that authority. 47 C.F.R. § 20.15. The Commission determined that a carrier's success should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs –not by strategies in the regulatory arena. *Orloff, supra*, at p. 419.

The Commission has stated on several occasions:

> The pro-competitive deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish with substantial benefits for consumers. In this environment, Congress has directed that the rate relationship between CMRS providers and their customers be

> governed by the mechanisms of a competitive marketplace in which prospective rates are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators.

Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rule Making, Adopted 3-10-05 and Released 3-18-05, 20-21, 34 (emphasis added); FCC Amicus Curiae Brief in *Hatch v. Cellco Partnership, dba Verizon Wireless*, in the Eighth Circuit, 9.

As a result of OBRA, the Commission directed wireless carriers to enter into individual contracts with their customers. Since there is no federal contract law, the contract law of the various states necessarily applies to these wireless carrier contracts. All of the customer service agreements of the major wireless carriers provide that the customer service agreements are to be governed and enforced under state contract laws. The T-Mobile customer service agreement provides: "22. Governing Law; Venue and Statute of Limitations. The agreement, its validity, construction and performance, shall be governed by the laws of the state associated with your number." The Nextel customer service agreement provides: "18. This agreement shall be governed by the laws of the State or Commonwealth in which this agreement is executed by the Company." The Cingular customer service agreement provides: "The law of the State of your billing address shall govern this agreement except to the extent that such law is preempted or inconsistent with applicable federal law." The Sprint customer service agreement provides: "This agreement is governed and must be construed under federal law and the laws of Kansas, without regard to choice of law principles." The AT&T Wireless agreement provides: "6.e. Governing Laws. This agreement is subject to applicable federal laws, federal or state tariffs, if any, and the laws of the state associated with the Number." The Verizon Wireless agreement provides: "It's governed by the laws of the state encompassing the area code assigned to your telephone number, without regard to the conflicts of laws rules of that state. It's also subject and governed by any applicable tariffs."

Thus, nobody imposed state law on the wireless carriers. Rather, they agreed to be bound by the contract laws of the various states with respect to the validity, construction, performance, and enforcement of their customer service agreements.

The Commission has stated that "the neutral application of state contractual or consumer fraud laws" are not preempted by Section 332(c)(3)(A). *In Re Southwestern Bell Mobility*, 14 F.C.C. Recd. at 19903, ¶10; *In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C. Recd. 17025, 8; *In the Matter of Petition of the State Independent Alliance*, 17 F.C.C. Recd. 14802, 19821, n. 119 (2002).

The Commission has also stated:

> We agree with those commentators who contend that Section 332 was designed to promote the CMRS industry's reliance on competitive markets in which <u>private agreements and other contract principles can be enforced</u>. It follows that if CMRS providers are to conduct business in a competitive marketplace, and not in a regulated environment, then <u>state contract and tort claims should generally be enforced in state courts</u>. We also agree with commentators who assert that enforcement of such laws through a monetary remedy is compatible with a free market. As Public Citizen asserts, "these duties fall no more heavily on CMRS providers than any other business.

In the Matter of Wireless Consumers Alliance, Inc., 15 F.C.C. Recd. 17021, ¶24 (emphasis added).

At p. 16 of the Sprint Corporation Comments, Sprint refers to the "strong public interest in preserving the sanctity of contracts...." Sprint then refers to a statement by the Commission in *Ryder Communications v. AT&T*, 18 F.C.C. Recd. 13603, 13616, ¶28 (2003), as follows:

> There is simply no justification for allowing a customer to negotiate for concessions on price, to sign a contract containing customized provisions that are the product of voluntary agreement, and then run to the Commission to have the Commission reform a provision of the contract that was an integral part of the *quid pro quo* bargain which subsequently produces a hardship on the customer.

It should be pointed out that this statement concerning the "sanctity of contracts" by the Commission was made in a matter involving the tariff system and the filed rate doctrine. It is ironic, based upon the foregoing statement by the

Commission, that the wireless carriers have now come running to the Commission seeking relief from the application of state contract laws when all of the major carriers have agreed that state contract laws govern the enforcement of their respective service agreements. It should also be pointed out that the wireless service agreements are forced upon subscribers by the wireless carriers and constitute contracts of adhesion. More specifically, each major wireless carrier has standard pre-printed contract forms which are presented to subscribers on a "take it or leave it" basis. No subscriber has any ability whatsoever to negotiate a change in any of the terms of these standard form service agreements. Thus, it was the major wireless carriers who inserted the provision in their respective service agreements that it was to be governed and enforced under state contract laws.

B. THE MAJOR WIRELESS CARRIERS HAVE ADMITTED THAT THEIR ETFs ARE LIQUIDATED DAMAGES PROVISIONS DESIGNED TO COMPENSATE THEM FOR DAMAGES SUFFERED BY THEM WHEN A SUBSCRIBER'S SERVICE CONTRACT IS TERMINATED EARLY . ACCORDINGLY, THEY ARE NOT "RATES CHARGED" FOR CELLULAR SERVICE PROVIDED TO ANY SUBSCRIBER

The major wireless carriers and the CTIA have come before the Commission claiming that an ETF is a "rate charged" for wireless service. This contention by the wireless carriers and the CTIA is not made in good faith. The wireless carriers have admitted that their ETFs are liquidated damages provisions designed to compensate them for damages suffered when a subscriber's service contract terminates prior to the end of the contract term. Thus, in the standard form service agreements of Nextel, AT&T Wireless and T-Mobile USA, the ETF is described as an agreed upon amount for liquidated damages. At p. 8, fn. 12 of Nextel's comments, the liquidated damages clause contained in Nextel's service agreement is set forth. It states in pertinent part:

> If customer breaches this Agreement or terminates Service for any reason (including by porting its Phone Number to another service provider) Customer understands and acknowledges that Nextel will not receive the full benefit of its Agreement with Customer, in

45374

> part because Nextel will not continue to receive monthly service charges from Customer. As a result, Nextel shall incur damages that are difficult, if not impossible, to determine. THEREFORE, IN THE CASE OF BREACH OR EARLY TERMINATION OF THE AGREEMENT BY CUSTOMER, CUSTOMER SHALL PAY TO NEXTEL, AS LIQUIDATED DAMAGES AND NOT AS A PENALTY (IN ADDITION TO ALL AMOUNTS THEN OWED TO NEXTEL), $200 FOR EACH NUMBER ASSIGNED TO CUSTOMER'S ACCOUNT AS A REASONABLE ESTIMATE OF THE DAMAGES INCURRED BY NEXTEL.

In *Hall v. Sprint Spectrum LP et al.*, a nationwide class action in an Illinois state court, in the Court's order granting a motion for class certification, it states: "Sprint itself claims the ETF to be a 'liquidated damage' and as such its proof and calculation is already known." (Court's Order, attached as Exhibit B to WCA's Initial Comments, at p. 6).

At p. 25 of its Petition, CTIA states: "Even if the service charge is a void liquidated damage, the non-breaching party is still entitled to recover its actual damages." This is an obvious admission by the CTIA that the ETF is a liquidated damages clause for recovery of damages for breach of contract. At p. 12, fn. 41, of its Petition, CTIA acknowledged that the ETF is a measure of contract damages. CTIA states:

> It is immaterial for purposes of the analysis of the ETF as a part of wireless carriers' rate structure whether, as a matter of contract law, the ETF is viewed as a conditional payment for the handset or services, as a reasonable approximation of lost profits, as reliance damages of the carrier, or some other proper measure of contract damages to make the carrier whole for services and goods delivered and accepted by the subscriber.

At p. 15 of its Petition, CTIA admits that the ETF is an alternative to a breach of contract claim for damages. CTIA refers to the expectation of the wireless carrier that initial and ongoing costs can be recouped gradually over time. It states: "This expectation is based, in turn, on the existence of the ETF, without which the transaction costs of suing customers for damages resulting from breach will be prohibitive." At p. 18 of its Petition, CTIA acknowledges that the ETF is the recovery of revenue lost as a result of a customer's breach of the contract. CTIA also acknowledges that an ETF is paid only if the customer breaches the contract.

The wireless carriers in the Alameda County, California Superior Court cases have acknowledged that the ETF is an agreed upon amount for breach of contract if the subscriber terminates his or her service contract early. In a joint memorandum of points and authorities in opposition to plaintiffs' motion for class certification, at p. 2, lines 7-11, it is stated:

> That is because the only function of [California Civil Code] §1671(d), even if this Court were to find the ETFs to be invalid under that section, would be to preclude defendants from enforcing the ETFs as a substitute for actual damages. Even if an alleged liquidated damages provision is deemed unenforceable under §1671(d), 'breaching parties remain liable for the actual damages resulting from the breach.

At p. 16, lines 8-11, the wireless carriers state: "Thus, if this Court were to hold that the ETF is a liquidated damage provision and also is invalid, defendants will be able to recover actual damages attributable to each class member's early termination of that customer's service agreement." See Exhibit 1 hereto. Thus, the wireless carriers admit that the ETF is a recovery of a specific damage amount for a breach of contract.

1. <u>The Liquidated Damages Laws of the Fifty States are Uniform in Nature and Have Existed in Most States for Over 100 Years</u>

"Liquidated damages" are defined as follows:

> An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages. <u>Black's Law Dictionary</u>, p. 395, 7th ed.

A "penalty clause" is defined as "a contractual provision that assesses an excessive monetary charge against a defaulting party. Penalty clauses are generally unenforceable." <u>Black's Law Dictionary</u>, p. 1154, 7th ed. The foregoing definitions are not limited to a specific state's contract laws, but rather, they apply to all state jurisdictions.

Under state law, the rights and obligations of contracting parties are governed by their written agreements. *Vanderbilt University v. DiNardo*, 174 F.3d 751, 758, (6th Cir. 1999). Contracting parties may agree to the payment of liquidated damages in the event of a breach. *Vanderbilt University, supra*, at p. 755. The term "liquidated damages" refers to an amount determined by the parties to be just compensation for damages should a breach occur. Courts will not enforce such a provision, however, if the stipulated amount constitutes a penalty. A penalty is designed to coerce performance by punishing default. *Vanderbilt University, supra*, 174 F.3d at p. 755.

The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from the failure to perform under a contract. A penalty, therefore, is designed to coerce performance by punishing nonperformance; its principal object is not compensation for the losses suffered by the nonbreaching party. *In Re Graham Square, Inc.*, 126 F.3d 823 (6th Cir. 1997). Reasonable compensation for actual damages is the legitimate objective of liquidated damages provisions and where the amount specified is manifestly inequitable and unrealistic, courts will ordinarily regard it as a penalty.

In Hall v. Sprint Spectrum L.P., supra, after conducting an extensive analysis of the law of all states, the court found that all states were in accord regarding penalties. The Court stated in its Order at pp. 7-8:

> The Court has concluded an extensive analysis of the varying state consumer protection laws and cannot find the "wild divergence" that Sprint decries. In fact, the Court has not found, nor has Sprint presented, any outcome determinative differences in the substantive laws reviewed. Nor has the Court found outcome determinative variations in the substantive law of contracts or unjust enrichment. The restatements have taken root in the multistate jurisdictions implicated in this litigation providing the requisite uniformity to merit certification. Indeed, all states are in accord regarding penalties.

The validity of the *Hall* court's conclusion is confirmed by reference to liquidated damages cases from throughout the United States, which adopt the same or similar legal standards. *See, e.g., In Re Graham Square, Inc.,* 126 F.3d 823, 829 (6th Cir. 1997); *Vanderbilt University v. DiNardo*, 174 F.3d 751, 758 (6th Cir. 1999) (Tennessee law); *Finkle v. Gulf & Western Manufacturing Company*, 744 F.2d 1015 (3rd Cir. 1984) (Pennsylvania law); *Baez v. Banc One Leasing Corporation*, 348 F.3d 972 (11th Cir. 2003) (Georgia law);

Simons v. GTE Mobilenet, Inc., Case No. H-95-5169 (S.D. Tex. 1995), at 14(Texas law); *Hitz v. First Interstate Bank*, 38 Cal.App.4th 274, 44 Cal.Rptr.2d 890 (1995) (California law).

The legal standards for liquidated damages are not only substantially uniform across the country but also well-established. Thus, the common law rule of liquidated damages was enunciated in California as early as 1856, before being codified in 1872 into § 1671 of the California Civil Code. *See Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1383, 1399, 1 Cal.Rptr.2d 446.

Discussing the California law of liquidated damages, the California Court of Appeal, in *Hitz v. First Interstate Bank*, 38 Cal.App. 4th at 288, stated:

> For liquidated damages to be valid under subdivision (d) of Civil Code Section 1671, it must have been impracticable or extremely difficult to fix actual damage. Further, the amount of liquidated damages must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. Absent either of these elements, a liquidated damages provision is void….

If a charge is designed to exceed substantially the damages suffered, the provision for the additional sum, whatever its label, is an invalid attempt to impose a penalty. *Hitz*, at 289. There must be a reasonable endeavor to estimate a fair average compensation for any loss that may be sustained, and such an estimate cannot occur without some sort of analysis of the loss that is to be compensated. *Hitz* at 291; *Garrett v. Coast & Southern Federal Savings & Loan Association*, 9 Cal.3d 731, 738-739, 108 Cal.Rptr. 845, 511 P.2d 1197. In *Garrett*, the Court pointed out that "a penalty provision operates to compel performance of an act and usually only becomes effective in the event of a default upon which a forfeiture is compelled without regard to the actual damages sustained by the party aggrieved by the breach." 9 Cal.3d at 739.

A consumer may seek relief from unlawful liquidated damages. *Beasley, supra*, 235 Cal.App.3d at 1401. A party breaching a contract may assert "relief from forfeiture" or "unlawful penalty" as an affirmative equitable defense to enforcement of a contractual provision or as grounds for relief in an action for restitution of property forfeited. *Ridgeley v. Topa Thrift & Loan Association*, 17 Cal.4th 970, 73 Cal.Rptr.2d 378, 953 P.2d 484 (1998).

2. The Class Action Lawsuits Filed in California, Illinois and Florida Seek a Court Determination Whether the ETF is a Lawful Liquidated Damage Clause or Is In Fact a Penalty

The class action suits pending in California, Illinois and Florida are not efforts to regulate wireless rates. Rather, they are challenges to particular companies' ETFs, brought under neutral state contractual and consumer protection laws of general applicability. The allegations in those cases have nothing to do with rates. Rather, it is alleged in all of these actions, *inter alia*, that the ETFs in question therein do not satisfy state-law legal standards for liquidated damages. Thus, it is variously alleged in particular cases (1) that there has been no agreement on a liquidated damages amount; (2) that damages from breach of the subscriber agreements in question are not impracticable or extremely difficult to determine but, rather are easily ascertainable; and (3) that the amount selected does not constitute a fair estimate of the carrier's anticipated damages in the event of early termination.

If the courts determine that these ETFs are contractual "penalties," then under the law of every state they will be unenforceable. On the other hand, if the courts determine that the ETF is a valid liquidated damage clause, then the status quo will remain.

Consumers believe that the ETF is a "penalty clause" in part because in almost every wireless service agreement, the ETF is a flat fee irrespective of when the subscriber breaches his or her agreement by terminating early. The amount of the ETF is the same irrespective of whether the breach for early termination occurs one month after the service agreement comes into existence, or one month before the end of the term contract. One partial exception to the foregoing is the Cingular Wireless service agreement. That service agreement (attached as Exhibit M to WCA's Initial Comments) provides in pertinent part:

> If we terminate your service for nonpayment or other default before the end of the Service Commitment, or if you terminate your service for any reason other than (a) in accordance with the 15-day cancellation policy; or (b) pursuant to change of terms, conditions, or rates as set forth below, you agree to pay us, in addition to all other amounts owed, an Early Termination Fee in Florida, Georgia, South Carolina, North Carolina, Kentucky, Tennessee, Mississippi, Louisiana, Alabama, New York, applicable Parts of Indiana and applicable Parts of New Jersey in the amount of $240 per phone divided by the total number of months in your Service Commitment, then multiplied by the remaining months or parts of months in such service commitment, and in all other areas in the amount of $150 per phone ("Early Termination Fee"). The Early Termination Fee is not a penalty, but rather a charge to compensate us for your failure to satisfy the Service Commitment on which your rate plan is based.

Thus, the Cingular service agreement acknowledges that a valid liquidated damage clause requires agreement of a reasonable estimate of damage. That is why the $240 amount is prorated depending upon the number of months left in the term agreement after the early termination breach by the subscriber. Unfortunately, Cingular has seen fit to apply this approach in only 12 states out of 50. Otherwise, it is a flat rate $150 ETF.

In *Hall v. Sprint Spectrum LP, supra*, in the Court's Order granting class certification filed on May 20, 2005, the Court stated, at p. 5: "The record indicates the following: ... (4) Sprint allegedly did not attempt to estimate the amount of actual damages it might incur (if any) were a customer to cancel early; (5) Sprint allegedly is capable of calculating (with remarkable specificity) the actual alleged damages sustained in the event of early termination ...” Thus, the Court pointed to several facts involving Sprint which demonstrated that the ETF was a “penalty clause.

3. The Arguments of the Wireless Carriers and CTIA that the ETF Is Essential to Recover Up-front Costs and Avoid “Rate Increases” Are Deceptive and Without Any Basis in Fact

The wireless carriers and CTIA assert various strained rationales for their conclusion that ETFs are “rates charged.” Thus, they argue:

- that ETFs are “rates” because they are sums of money that a subscriber agrees to pay a wireless provider for the services and equipment previously provided by the carrier.

- that ETFs are “rates charged” because they are essential to recover up-front costs such as customer acquisition costs and discounted handset costs that have been spread over the term of the contract;

- that a state court order refunding, reducing, modifying, or eliminating the ETF would be nothing more than a forced rebate or a forward-looking reduction of the price charged for service.

- that even if an ETF were not itself a rate, it is part of the carriers’ rate structure such that a state law limitation on the ability to impose an ETF would force the carrier to change other rates in order to recover its costs, thereby resulting in rate regulation prohibited by Section 332(c)(3)(A); and

- that the fact that other rate elements would have to be adjusted upward in response to an order in favor of the plaintiffs in the pending cases conclusively shows that an ETF is part of the overall rate charged.

All of these arguments are without merit. First, the contention that ETFs represent a sum of money that subscribers agree to pay the wireless carriers for recovery of customer acquisition costs and the discounted handset is utterly baseless. Indeed, nothing could be further from the truth. The subscriber pays a monthly service charge or access charge for access to the wireless system, and also pays a monthly charge for whatever air time plan the subscriber has selected. There is no suggestion in any of the wireless service agreements that the ETF is for the payment of a certain amount of money for customer acquisition costs and the cost of a discounted handset. Indeed, if it were measured in that way it would not pass muster. Damages awarded to an injured party for breach of contract seek to approximate the agreed-upon performance. *Applied Equipment Corporation v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 515, 28 Cal.Rptr.2d 475, 869 Pac.2d 454 (1994). The goal is to put the plaintiff in as good a position as he or she would have occupied if the defendant had not breached the contract. In other words, the plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's contractual bargain. *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District*, 34 Cal.4th 960, 968 (2004). The injured party's damages cannot, however, exceed what it would have received if the contract had been fully performed on both sides. This limitation of damages for breach of contract serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise. *Lewis Jorge Construction Management, Inc., supra*, at 968.

The argument that a state court order refunding, reducing, modifying, or eliminating the ETF would be nothing more than a forced rebate or a forward-looking reduction of the price charged for service is equally flawed. This argument assumes that the wireless carriers will be "out of pocket" if the state courts find that their ETFs are unenforceable penalty clauses. But the carriers refute their own argument by asserting, in the next breath, that if there were no ETF they would be entitled to sue for "actual damages."

Thus, at p. 25 of its petition, CTIA states: "Even if the service charge is a void liquidated damage, the non-breaching party is still entitled to recover its actual damages." On July 15, 2005, Verizon Wireless filed a First Amended Cross-Complaint against its subscribers in the California ETF cases seeking "actual damages" incurred by Verizon Wireless for early termination breaches by its subscribers. Exhibit F to WCA's Initial Comments. Verizon alleges that "damages incurred by Verizon Wireless include but are not limited to the excess of remaining monthly payments due under the subscription agreement over the cost of serving Morton for the remainder of the agreed-upon term." (See ¶21 of Verizon's First Amended Cross-Complaint). It should also be pointed out that Verizon's stated measure of damages makes no mention of the recovery of the "up-front costs," such as customer acquisition costs and subsidized handset costs.

Even though CTIA claims that carriers could sue for "actual damages" if there were no ETFs, it nevertheless seeks to enlist the Commission's sympathy by complaining that "without ETFs the transaction costs of suing customers for damages resulting from breach would be prohibitive." (CTIA petition p. 15) But this contention, even if true, would have nothing to do with preemption. Moreover, the claim that the costs of bringing suit against a customer for "actual damages" would be prohibitive is totally frivolous. CTIA and the wireless carriers have no facts that would support such an assertion.

Under the current ETF system, if a subscriber terminates early, the wireless carrier includes in its final billing to the subscriber a charge for the ETF. The subscriber either pays the ETF or he or she doesn't. If the subscriber does not pay the ETF after being billed, the wireless carrier selects one of three choices: (1) the matter is turned over to a collection agency; (2) the subscriber is sued by the wireless carrier for the amount of the ETF because of the early termination breach; (3) the wireless carrier does nothing. The undisputable fact is that if the wireless carriers are intent upon collecting unpaid ETFs they will have to initiate some form of legal action to do so. Neither the carriers nor CTIA have made any showing that the carriers' costs of suing a customer for "actual damages" would be greater than their cost of suing that same customer for an ETF.

Thus, the argument that ETFs are "rates charged" because any order modifying, reducing, refunding or eliminating them would cause a "loss of revenue" to the wireless carriers is devoid of any evidentiary or logical support.

CTIA also argues that "even if an ETF were not itself a "rate," it is part of the carriers' rate structure such that a state law limitation on the ability to impose ETFs would force the carrier to change other rates in order to recover its costs, resulting in rate regulation prohibited by Section 332(c)(A). (CTIA petition p. 15) According to CTIA, "state-by-state invalidation or limitation of ETFs will force wireless providers to reevaluate their current plan offerings, raise initial prices for consumers, eliminate handsets subsidies, or compare other rate changes that would harm wireless consumers." (CTIA petition p. 28) However, these assertions fail on several separate and independent grounds. First, they assume that a modification, full or partial refund, reduction or elimination of ETFs would necessarily cause every wireless carriers a substantial loss of revenue – a proposition for which, as we have indicated above, there is no support. There is yet another reason why rates for wireless service would not increase if the ETFs were modified, reduced, refunded or eliminated as an unlawful penalty clause. All wireless carriers would be in the same boat with respect to "customer churn" if there were some court order affecting the charging of ETFs . No wireless carrier would want to raise rates for fear of a substantial loss of customers. Under current ETF contract provisions, a subscriber can terminate a service contract without penalty if the wireless carrier raises rates. The Commission has stated that "preventing carriers from imposing restrictions on porting will benefit consumers by preventing carriers from establishing barriers to competitive switching. With customers able to switch more freely among carriers, competitive pressure will encourage carriers to compete for customers by offering lower prices and new services." *In the Matter of Telephone Number Portability*, 18 FCC Rcd 20971, 20976 (October 7, 2003).

A report submitted to the Commission by US Public Interest Research Group under letter dated August 16, 2005, and entitled "Locked in a Cell; How Cell Phone Early Termination Fees Hurt Consumers," refers, at p. 6, to a GAO nationwide poll of cell phone users that found that 20% of cell phone users wanted to change cell phone service providers, but were prevented from switching because of ETFs. In *Hall v. Sprint Spectrum LP, supra*, the court in its order granting class certification stated at p. 5: "The record indicates the following: . . . (a) plaintiff has presented Sprint documents that indicate that at least one purpose of the ETF policy was to prevent customers from canceling and is therefore both a threat to secure future performance and a penalty for having done so." As with telephone number portability, a modification or elimination of ETFs could enable customers to switch more freely among wireless carriers. Competitive pressure would encourage carriers to compete for customers by offering lower prices and new services.

C. THE WIRELESS CARRIERS AND CTIA HAVE INACCURATELY DESCRIBED THE CLAIMS SET FORTH IN THE STATE CLASS ACTION LAWSUITS IN ORDER TO FALSELY AND UNFAIRLY ENHANCE THEIR PROSPECTS OF OBTAINING A FAVORABLE RULING FROM THE COMMISSION

1. <u>The Wireless Carriers and CTIA Have Falsely Asserted that the ETF Lawsuits Are Premised On the Allegation that ETFs Are Unreasonable and Constitute the Regulation of Rates Charged Under Section 332(c)(3)(A).</u>

In the Verizon Wireless comments, at p. 18 and p. 22, Verizon claims that the ETF lawsuits are premised on the allegation that ETFs are unreasonable, unfair and inequitable, and therefore, are preempted by Section 332(c)(3)(A). CTIA states that the state court cases require the state courts to determine whether an otherwise valid ETF should be overturned as unreasonable. (CTIA petition, p. 22-23) The wireless carriers and CTIA are engaging in deception in describing the state court ETF cases in this fashion.

The language of the carriers' own contracts illustrates this deception. As discussed above and in WCA's Initial Comments, those contracts explicitly or implicitly characterize ETFs as contractual liquidated damages provisions. For example, Nextel's ETF clause refers to a customer breaching a service agreement or terminating service for any reason. The EFT clause states: "As a result, Nextel shall incur damages that are difficult, if not impossible to determine." This is one of the elements under state contract laws which must be established in order to establish a valid liquidated damage provision. The Nextel ETF clause goes on to state: "Therefore, in the case of breach or early termination of the agreement by customer, customer shall pay to Nextel, as liquidated damages and not as a penalty . . . $200 for each number assigned to customer's account as a reasonable estimate of the damages incurred by Nextel." This later statement set forth the second element which must be established in order to have a valid liquidated damage provision, to wit, parties to the contract may agree upon a "reasonable estimate of the damages incurred by a breach by the aggrieved party." The wireless carriers and CTIA have taken the element of a "reasonable estimate of damages" and transformed it into the "reasonable of a rate." A damage estimate for liquidated damage purposes can hardly be deemed a rate charged for wireless service.[1]

2. <u>The Wireless Carriers and CTIA Have Deceived the Commission by Claiming that the Elimination of ETFs Threatens the National Uniformity and Respect for Competitive Market Forces that Has Been the Centerpiece of the Commission's Successful Policy to Promote Wireless.</u>

[1] Of course, some or all of the state courts in the ETF cases may never reach the issue of whether or not the ETFs were a reasonable estimate of the damages incurred as a result of a breach for early termination of the service agreement. If a court were to determine that it would not be impracticable or extremely difficult to determine a particular carrier's actual damages, that carrier's ETFs would likely be found to be unenforceable contractual penalties. Liquidated damages are void if either of the two elements is absent. *Hitz v. First Interstate Bank, supra*, 38 Cal.App.4th at 292.

CTIA argues that state-by-state invalidation or limitation of ETFs threaten the very national uniformity and respect for competitive market forces that both Congress and the Commission have made the centerpiece of their successful policy to promote wireless. (CTIA petition, p. 28). Similarly, Verizon Wireless argues in its Comments, at p. 27, that state "regulation" of ETFs through the pending lawsuits threatens to substantially impair the uniform, national and deregulatory framework established by the FCC, and will result in a patchwork of haphazard oversight that requires the carriers to adjust their rate structure from jurisdiction to jurisdiction.
However, this argument is without merit. First of all, nationwide uniformity at all costs is not the policy of the Commission, and is definitely not the will of Congress. Indeed, Congress deliberately subjected the preemption provision of § 332(c)(3)(A) to two "savings clauses" – discussed in WCA's Initial Comments – that expressly allow states to enforce laws of general applicability and to regulate the "terms and conditions" of wireless service. Moreover, because, as discussed at length above, the laws of the 50 states regarding liquidated damages are substantially identical to each other, state litigation challenging ETFs poses no threat to "nationwide uniformity."

The wireless carriers and CTIA contend that the application of state contract laws relating to liquidated damages would impair the nationwide rate/service plans that the wireless carriers claim exist. While the form of rate plans may be similar throughout the country, the rates charged for wireless service are not the same throughout the country. In fact, wireless service rates vary by SMSA and by RSA. In other words, the rates charged for wireless service in Birmingham, Alabama are different from the rates charged by the wireless carriers for wireless service in Los Angeles, California. Proof of this fact is easily established by seeking to find rates on the website of a major carrier such as Sprint/ Nextel. In order to obtain a quote for rates charged, one must enter the subscriber's ZIP code. Obviously, if rates charged for wireless service by Sprint/Nextel were the same throughout the country, one would not have to enter one's ZIP code to obtain the rates for his or her particular market area.

3. Verizon Wireless Deceptively Argues that State Regulation of ETFs Violates the Commerce Clause of the U.S. Constitution.

Verizon Wireless argues that state regulation of ETFs violates the Constitution's Commerce Clause. This argument is deceptive because there are no state laws that directly regulate ETFs. Rather, this matter concerns the enforcement of state contract laws which prohibit any contract clause that imposes a penalty on a party to the contract. The CTIA and SunCom petitions are not about prohibiting a state legislature or a state public utilities commission from enacting laws or regulations specifically directed to regulate the wireless industry. Rather, we are talking here about subscribers of wireless carriers filing lawsuits seeking relief under generally applicable state contract laws to determine whether or not the ETFs constitute unlawful penalty clauses.

Verizon points out that the Commerce Clause prevents a state from creating regimes that are in substantial conflict with the common regulatory scheme of other states. Verizon claims that piecemeal ETF regulation falls squarely in this category. First, there are no laws that directly regulate ETFs. Secondly, neither Verizon nor any other wireless carrier has presented any facts to the Commission establishing that state laws concerning liquidated damages are diverse, and the record shows that they are not. Thus, no state could create a regime that was in substantial conflict with the laws of other states, since all state laws are the same.

Verizon also argues that state superintendence over ETFs has an unconstitutional extraterritorial impact on conduct outside the state seeking to impose the regulations. Verizon claims there is a risk of "inconsistent obligations" given the regional and national configuration of wireless rate plans. The foregoing scenario could not possibly occur in the case of ETFs because the state contract laws concerning liquidated damages are the same in all 50 states.

Moreover, Verizon's argument has an unintended consequence. If Verizon is right and state liquidated damages laws are unconstitutional, then so are the provisions of state contract law that the carriers seek to enforce in forcing subscribers to adhere to their contracts. The carriers want it both ways – they want state contract law to apply so as to permit them to sue subscribers for breach of their contracts, but they are unwilling to accept the provisions of state contract law that protect consumer rights and limit the enforceability of certain types of contractual provisions such as liquidated damages. Nothing in the Commerce Clause or any case decided thereunder permits the carriers to pick and choose which state contract law provisions they will accept.

4. The Wireless Carriers and CTIA Argue that Elimination of ETFs Threatens to Up-end the Industry's Competitive Pricing Model and Replace It with a Balkanized, Heavy-handed Regulatory Regime

The wireless carriers and CTIA contend that elimination of ETFs threatens to up-end the industry's competitive pricing model and replace it with a Balkanized, heavy-handed regulatory regime. This contention is frivolous. First, there is no state regulation directed specifically at ETFs. This matter concerns uniform state contract laws of general applicability which determine when a liquidated damages clause is valid, and when a liquidated damages clause is a penalty and unenforceable.

There is no "competitive nationwide pricing model" in existence. There are no nationwide rates. The rates charged vary according to each SMSA or RSA. There is not a nationwide market so far as rates charged are concerned. Simply put, the enforcement of state contract laws concerning liquidated damages does not comprise a "heavy-handed regulatory regime."

5. The Contention of the Wireless Carriers and CTIA that Customers Prefer Term Contracts with ETFs is Simply Not True

The wireless carriers and CTIA contend that their customers have overwhelmingly demonstrated their preference for term contracts with ETFs as compared to prepaid or postpaid plans without term commitments. For example, Nextel argues in its Comments that the elimination of ETFs would destroy the ability of wireless carriers to offer the type of innovative nationwide service plans that consumers demand. Sprint states that in response to market demands, wireless carriers developed term contracts with ETFs. (Sprint Comments, p. 14)

For the wireless carriers to claim that term contracts with ETFs developed because of consumer demand is absurd. The wireless carriers all have adhesive service contracts that are very similar in content. Each of these service agreements of the wireless carriers is a standard form pre-printed contract of adhesion that the subscriber does not usually see until he has already signed up for service. The contract terms of these adhesive contracts are not negotiable by the subscriber. These contracts are offered to the subscriber on a take or leave it basis. To suggest that the "terms and conditions" of these wireless service agreements are the product of "consumer demand" is preposterous. It was a decision made solely and only by the wireless carriers to put ETF clauses into the term contracts. Wireless carriers structure the "terms and conditions" of their contracts any way they so desire, and it has nothing to do with "consumer demand." That more subscribers sign up for term contracts than contracts without a term is a function of the fact that the carriers have deliberately priced non-term contracts at unattractively high levels. And the reason why the carriers do that is that they prefer to have customers tied up contractually for a one- or two-year period.

The contention of the wireless carriers and CTIA that the ETF clauses are the result of "consumer demand" is further impeached by the *FCC Quarterly Report on Informal Consumer Inquiries and Complaints* (Released August 12, 2005). In this report, the Commission noted that wireless complaints rose from 4,369 in the fourth quarter of 2004 to 7,330 in the first quarter of 2005. The FCC report lists complaints by category. One category for wireless carriers is "Billing/Rates." Another category of complaints is "Contract – Early Termination." The report indicates that for the first quarter of 2005, there were 1,118 consumer complaints involving early termination. The billing and rates complaints for the same period numbered 4,006.[2]

A report submitted to the Commission by U.S. Public Interest Resource Group of August 16, 2005, it indicated that 47% of the respondents would switch cell phone companies if ETFs were eliminated. The report also stated that 36% of respondents replied that the ETFs had prevented them from switching to another carrier. The foregoing statistics clearly show that "consumer demand" had nothing whatsoever to do with the insertion of ETF clauses into wireless carriers' service agreements.

D. THE CASES RELIED UPON BY CTIA AND THE WIRELESS CARRIERS HAVE NO APPLICATION TO THIS PROCEEDING, WHERE THE ISSUE IS WHETHER OR NOT APPLICATION OF STATE CONTRACT LAWS TO A LIQUIDATED DAMAGES CLAUSE IS PREEMPTED BY FEDERAL LAW

The cases on which the wireless carriers and CTIA rely in support of their preemption argument are inapposite. *In the Matter of Ryder Communications, Inc. v. AT&T Corporation*, 18 F.C.C. Recd 13603, 2003 FCC LEXIS 3746 (2003) involved a wireline interstate carrier over whom states never had any jurisdiction prior to deregulation. The issue was whether or not AT&T's enforcement of the early service termination provision contained in the parties' contract tariff for 900 transport service was unjust and unreasonable under Section 201(b) of the FCA. Interestingly, the Commission stated at ¶24 that "the long term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts." Ryder asserted that it lacked bargaining power in the negotiation with AT&T, and had no choice but to accept the early service termination

[2] Also of interest is the fact that the Commission lists early termination complaints under "Contract" and not under "Billing/Rates." From this difference in categories, one could conclude that the Commission does not consider the ETF to be a rate charged for wireless service.

provision. AT&T effectively rebutted this assertion with evidence that contract negotiations were extensive and included healthy give and take with respect to the terms and conditions of the agreement. The Commission stated at ¶ 28 that "revising CT6831 in that manner would contravene the strong public interest in preserving the sanctity of contracts..." The issue of whether or not the early service termination provision was an unlawful penalty clause under state contract law appears not to have been raised in Ryder Communications.

Miller v. Nissan Motor Acceptance Corporation, 362 F.3d 209 (3rd Cir. 2004), involved an alternative formula charge that was a liquidated damages formula, and the Court found that the alternative formula charge was a reasonable liquidated damages provision in light of the actual harm.

In *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197 (D.C. Cir. 1987) the Court held that imposition of charges for early termination of long-term equipment (CPE) leases was not <u>inherently anti-competitive</u>. The Court stated as follows at p. 1201-1202:

> There is no difference between a firm's collecting a cost-based charge triggered by early termination of a fixed term lease and the same firm's collecting damages arising from breach of any contract that is performed over time. Petitioners do not suggest that the termination charges here at issue are in any way disproportionate to the costs that would otherwise not be recovered on account of customers' premature termination.

In the foregoing statement, the Court determined that the termination charges were not an unlawful penalty. That is to be contrasted with the matter now before the Commission, wherein the ETF clauses in the wireless carriers' service agreements appear to be penalty clauses, and not valid liquidated damages provisions.

In *MCI Telecommunications Corporation v. FCC*, 822 F.2d 80 (D.C. Cir. 1987) the FCC allowed AT&T to implement proposed revisions to its interstate private-line tariffs establishing project liability charges for a customer's cancellation or discontinuance of large service orders. The issue presented was whether or not the cancellation tariff violated the settlement agreement. The issue had nothing to do with whether or not the project liability charge was an unlawful penalty clause, because it was not governed by contract law but, rather, by FCC regulation of tariffs. That the Commission found that the project liability charges were "rates" within the meaning of the settlement agreement under wireline-based tariff law has no relationship to the contracts between wireless carriers and their subscribers.

The wireless carriers and CTIA rely on *Aubrey v. Ameritech Mobile Communications, Inc.*, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 17, 2002). The Court stated at p. 12:

> By alleging that the rates which AMC charged for terminating a subscriber's services were exorbitant, it is clear that the plaintiff is challenging the rates charged by AMC for its wireless services. Based on these allegations a decision in plaintiff's favor would require a determination as to the type and adequacy of the technology that a wireless service provider, like AMC, must use in order to enter or serve a particular market. Moreover, it would also obligate AMC to lower its rates for these services.

The Court in Aubrey relied upon *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000), a case which has been criticized, and which has not been followed by many federal courts, because its analysis depends on concepts and reasoning from the "filed rate doctrine" era. In Aubrey, the Court simply assumed the ETF was a rate charged for wireless service without any analysis whatsoever. The statement by the court that the elimination of the ETF would " obligate AMC to lower its rate for these services" is based upon what the court perceives to be a rate reduction caused by the restitution of ETFs to AMC's subscribers. Furthermore, there is no suggestion that the issue of the ETF as an unlawful penalty clause was raised in the case.

MCI Worldcom, Inc. v. FCC, 209 F.3d 760 (D.C. Cir. 2000) actually supports the opponents of the CTIA petition in this matter. While the *MCI Worldcom* case involved interstate and domestic wireline carriers, it still has application to this matter before the Commission because it was an outgrowth from the Telecommunications Act of 1996 which required the FCC to forbear from applying any regulation or any provision of the FCA under certain conditions. Armed with this new statutory authority, the Commission moved to detariff the interstate, domestic and interexchange services of nondominant carriers. The long distance telecommunications carriers petitioned for review of the orders of the Commission that prohibited them from filing tariffs with the FCC. The carriers complained that detariffing would lead to their customer relationships being governed by state contract laws, which, in some cases, might require the execution of a new contract whenever the carrier would want to change its rates. The carriers also argued that the necessity of mailing new contracts to customers would increase their transaction costs resulting in higher prices for consumers, that it would make casual-calling options more difficult, and hinder the carriers' ability to respond quickly to competitors' price changes. 209 F.3d at 763. The Court stated at p. 765:

> Moreover, as we read the Commission's decision the essence of its reasoning was a desire to put the interexchange carriers under the same market conditions as apply to any other nonregulated provider of services in our economy.... It thought the public interest would best be served by "establishing market conditions that more closely resemble an unregulated environment." It noted that "parties that oppose complete detariffing have not shown that the business of providing interstate, domestic and interexchange services offered by nondominant interexchange carriers should be subject to a regulatory regime that is not available to firms that compete in any other market in this country.

The Court stated that "the Commission was entitled to value the free market, the benefits of which are rather well-established." 209 F.3d at 766. It is significant to note that it was the desire of the Commission that telecommunications carriers operate under the same market conditions that would apply to any other nonregulated provider of services in the American economy. In other words, telecommunications carriers would operate just like a General Motors, an IBM, etc.

Sprint argues, at p. 18 of its Comments, that the U.S. Supreme Court has rejected 47 U.S.C. § 414, the Communications Act's general savings clause, as preserving state law claims involving ETFs. Sprint cites *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998) for this proposition. Central Office Telephone was a "filed rate doctrine" case which the Commission held in Wireless Consumers Alliance had no application to the wireless industry.

At pp. 22-23 of Sprint's Comments, it discusses the federal district court's opinion in *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544, (S.D. Iowa, July 29, 2004). Sprint claims that the *Phillips* court stated that "the wireless carrier should raise its preemption argument in state court as a defense to the plaintiff's argument that the ETF is unlawful under the state unfair debt collection act." However, nowhere in the *Philips* opinion does the Court state that the wireless carrier should raise its preemption argument in state court as a defense to the plaintiff's argument that AT&T's ETF was unlawful under Iowa Unfair Debt Collection Act. Indeed, to the contrary, the Court in Phillips found that § 332 of the Communications Act completely preempted all challenges to rates and market entry. Thus, under such a finding, if the Philips court had found that the ETF was a "rate charged," federal jurisdiction would have been appropriate, and the motion to remand would have been denied. In fact, what the Phillips court concluded was that AT&T Wireless's ETF was not a part of the AT&T's rate structure. Therefore, the district court decided the precise issue that is now before the Commission , and there was nothing left for the state court on remand to decide with respect to preemption. Thus, Sprint has once again attempted to mislead the Commission to its own advantage.

III. CONCLUSION

For the foregoing reasons, the relief requested by Petitioners should be denied.

Dated: August 25, 2005 Respectfully submitted,

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TABLE OF CONTENTS

PAGE

I. EXECUTIVE SUMMARY 2

II. ARGUMENT 5

A. IN 1994, THE COMMISSION IMPLEMENTED THE PRO-COMPETITIVE DEREGULATORY FRAMEWORK FOR CMRS PRESCRIBED BY CONGRESS WHEREIN CONGRESS DIRECTED THAT THE RELATIONSHIP BETWEEN CMRS PROVIDERS AND THEIR CUSTOMERS BE GOVERNED BY SERVICE CONTRACTS IN A COMPETITIVE MARKETPLACE 6

B. THE MAJOR WIRELESS CARRIERS HAVE ADMITTED THAT THEIR ETFs ARE LIQUIDATED DAMAGES PROVISIONS DESIGNED TO COMPENSATE THEM FOR DAMAGES SUFFERED BY THEM WHEN A SUBSCRIBER'S SERVICE CONTRACT IS TERMINATED EARLY . ACCORDINGLY, THEY ARE NOT "RATES CHARGED" FOR CELLULAR SERVICE PROVIDED TO ANY SUBSCRIBER 9

1. The Liquidated Damages Laws of the Fifty States are Uniform in Nature and Have Existed in Most States for Over 100 Years 11

2. The Class Action Lawsuits Filed in California, Illinois and Florida Seek a Court Determination Whether the ETF is a Lawful Liquidated Damage Clause or Is In Fact a Penalty 14

3. The Arguments of the Wireless Carriers and CTIA that the ETF Is Essential to Recover Up-front Costs and Avoid "Rate Increases" Are Deceptive and Without Any Basis in Fact 16

C. THE WIRELESS CARRIERS AND CTIA HAVE INACCURATELY DESCRIBED THE CLAIMS SET FORTH IN THE STATE CLASS ACTION LAWSUITS IN ORDER TO FALSELY AND UNFAIRLY ENHANCE THEIR PROSPECTS OF OBTAINING A FAVORABLE RULING FROM THE COMMISSION 20

1. The Wireless Carriers and CTIA Have Falsely Asserted that the ETF Lawsuits Are Premised On the Allegation that ETFs Are Unreasonable and Constitute the Regulation of Rates Charged Under Section 332(c)(3)(A). 20

2. The Wireless Carriers and CTIA Have Deceived the Commission by Claiming that the Elimination of ETFs Threatens the National Uniformity and Respect for Competitive Market Forces that Has Been the Centerpiece of the Commission's Successful Policy to Promote Wireless. 21

3. Verizon Wireless Deceptively Argues that State Regulation of ETFs Violates the Commerce Clause of the U.S. Constitution. 23

4. The Wireless Carriers and CTIA Argue that Elimination of ETFs Threatens to Up-end the Industry's Competitive Pricing Model and Replace It with a Balkanized, Heavy-handed Regulatory Regime 24

5. The Contention of the Wireless Carriers and CTIA that Customers Prefer Term Contracts with ETFs is Simply Not True 24

D. THE CASES RELIED UPON BY CTIA AND THE WIRELESS CARRIERS HAVE NO APPLICATION TO THIS PROCEEDING, WHERE THE ISSUE IS WHETHER OR NOT APPLICATION OF STATE CONTRACT LAWS TO A LIQUIDATED DAMAGES CLAUSE IS PREEMPTED BY FEDERAL LAW 26

III. CONCLUSION 30